

Federal Communications Commission

DA 00-865

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DISPATCHED BY
Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 97-106
Table of Allotments,)	RM-9044
FM Broadcast Stations.)	RM-9741
(Cheyenne, Wyoming and)	
Gering, Nebraska) ¹)	

REPORT AND ORDER

Adopted: April 13, 2000

Released: April 14, 2000

By the Chief, Allocations Branch:

1. The Allocations Branch has before it the Notice of Proposed Rule Making and an Order to Show Cause issued in response to a request filed by TSBII, Inc. ("TSBII"), 12 FCC Rcd 3690 (1997). In response to the Notice, Tracy Broadcasting Corporation ("Tracy"), licensee of Station KOLT-FM, Gering, NE, and permittee of Stations KASX(FM), Pine Bluffs, NE, and KAWQ(FM), Bridgeport, NE, filed an Answer to Order to Show Cause and a Counterproposal. TSBII and Montgomery Broadcasting Limited Liability Company ("Montgomery") filed comments. TSBII, Tracy and Montgomery filed reply comments.

Background/Comments

2. The Notice proposed the allotment of Channel 280C2 at Cheyenne, Wyoming, as the community's sixth local commercial FM transmission service. The Notice also proposed the substitution of Channel 239C3 for Channel 280C3 at Gering, Nebraska, and the modification of Station KOLT-FM's license accordingly to accommodate the allotment. Tracy filed a counterproposal proposing to: 1) substitute Channel 267C1 for Channel 280C3 at Gering, Nebraska and to modify Station KOLT-FM's license; 2) substitute Channel 280C1 for Channel 287C2 at Pine Bluffs, Nebraska and to modify the construction permit for Station KASX-FM²; and 3) substitute Channel 239C3 for Channel 267C at Bridgeport, Nebraska, and to modify the construction permit for Station KAWQ(FM).³ Tracy urges the Commission to deny TSBII's proposal because it claims that the addition of Channel 280C2 to Cheyenne, WY will add a sixth local commercial FM station which is a

¹ Tracy is also the licensee of Stations KMOR-FM and KOLT(AM), Scottsbluff, NE, KOAQ(AM), Terrytown, NE, and KBFZ(FM), Kimball, NE, which are not involved in this proceeding.

² According to Tracy, the upgraded channel will allow the Pine Bluffs station to use a Tracy owned transmitter site located near Albin, Wyoming.

³ Public Notice of the counterproposal was given on October 14, 1999, Report No. 2364.

lesser priority than its proposal which would provide both a first and second full-time reception service under Priorities 1 and 2.⁴ Tracy further contends that the enormous costs associated with modifying Station KOLT-FM to operate on Channel 239C3 also warrant rejection of the TSBII proposal. TSBII has not disputed Tracy's engineering claims. However, while TSBII agrees to reimburse Tracy, it believes that Tracy's estimate of \$100,000 is excessive. Although Tracy wants the Commission to require TSBII to pay for its expenses in advance, TSBII states that it is confident that the parties can negotiate the reimbursement of the reasonable expenses. Lastly, Montgomery opposed TSBII's proposal on the grounds that it could have an adverse impact on programming and advertising in the Cheyenne, Wyoming market area.

Discussion

3. As a threshold matter, there are no alternate channels available to resolve the conflict between TSBII's and Tracy's rulemaking proposals.⁵ Consequently, we must compare these proposals using the FM Allotment priorities. Based on the information before us, we believe that the public interest would be better served by adopting TSBII's request to allot Channel 280C2 to Cheyenne, Wyoming for the reasons that follow.⁶

4. To begin with, Tracy argued that its counterproposal should be preferred because the substitution of Channel 280C1 for Channel 287C2 at Pine Bluffs will provide a first full-time aural service to 300 people in a 186 square kilometer area, thus satisfying Priority 1, and that 2,017 people in a 1,555 square kilometer area will receive a second full-time aural service thus satisfying Priority 2. Tracy claims that since its counterproposal will create a 40% net service gain for the Pine Bluffs station, will maintain the existing coverage of the Gering and Bridgeport stations and will provide a first and second full time aural service, its counterproposal serves the Commission's most important priorities.⁷ However, our technical review indicates that Tracy's engineering analysis is flawed. Our analysis reveals that the proposed upgrade and change of transmitter site for the Pine Bluffs station will create a gain area containing 83,763 persons and a loss area of 930 persons, resulting in a net gain of 82,833 persons. Our study further shows that there will be no first full-time aural reception service provided to any of the 83,763 persons within the gain area. While there is currently no FM service coverage to the area in which Tracy is claiming a first aural service priority, the .5 mV/m ground wave contour of clear channel AM Station KOA provides coverage, thus disputing Tracy's claim that its counterproposal will provide a first aural service to Pine Bluffs. Similarly, Tracy's Pine Bluff upgrade

⁴ The FM allotment priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight given to priorities (2) and (3).]

⁵ These proposals are mutually exclusive because Tracy's proposal to substitute Channel 280C1 at Pine Bluffs is short-spaced by approximately 150 kilometers to TSBII's proposal to allot Channel 280C2 at Cheyenne under the Commission's minimum distance separation rules. The required spacing between these two channels is 224 kilometers while the actual spacing is 73.6 kilometers.

⁶ Currently there are 3 NCEFM, 5 commercial licensed FM stations and 3 AM stations at Cheyenne, WY.

⁷ We note that Tracy's Pine Bluffs and Bridgeport stations are unbuilt.

will provide a second full time aural service to 638 people rather than the 2,017 people represented by Tracy under Priority 2. In addition, our technical review reduces this second full time aural service to 632 people because six persons within the loss area will lose a second full-time reception service, thus creating a “gray” area.⁸ Consequently, the Pine Bluffs upgrade would at best trigger Priority 2 because it could provide a second full-time reception service to 632 people. The Pine Bluffs upgrade would also provide 867 people with a third aural service, 602 people with a fourth aural service, and 293 people with a fifth aural service, thereby providing 1,762 underserved people within the gain area with additional service under Priority 4.

5. However, balanced against these public interest benefits are the public interest detriments of the Bridgeport station’s proposed downgrade from a Class C to C3. While we recognize that the Bridgeport station is unbuilt, under its current construction permit, the station could provide coverage to 24,460 persons within its 60 dBu contour. Changing from the Bridgeport construction permit site and decreasing the class from C to C3, the station will provide service to 8,338 persons within its 60 dBu contour, resulting in a service loss to 17,965 people and a gain of service to 1,843 persons. The net service loss from this downgrade is 16,122 people. Most significantly, downgrading the channel results in 211 people losing a potential first aural service that has already been authorized, thus creating a “white area” and triggering Priority 1. We believe that the creation of this “white area” under Priority 1 outweighs the benefits of the second full-time reception service that the Pine Bluffs upgrade could provide to 632 people because it triggers the highest allotment priority – that is, the retention of a first full-time reception service. Indeed, we have in the past denied proposals that would have triggered important allotment priorities such as a first local transmission service under Priority 3 because retaining the current arrangement of allotments would eliminate “white” areas and enable people to retain their only authorized aural reception service.⁹ In addition, 51 people would lose an authorized but unbuilt second full-time aural service by the Bridgeport downgrade, thereby creating a “gray” area.

On a cumulative basis, this would further reduce number of people that the counterproposal would provide a second full-time reception service from 632 to 581. In addition, the Bridgeport downgrade would also result in 14,776 other “underserved” people losing 3rd through 5th full-time reception services.¹⁰ By way of contrast, all 1,843 people in the gain area for Bridgeport are well served with five or more aural services.

6. As for the Gering upgrade, Tracy proposes to upgrade from Channel 280C3 to Channel 267C1 and change the site from which coverage can be provided to 59,109 people. These changes at Gering result in 19,550 people receiving additional coverage, with no loss areas. However, all of the

⁸ A “gray area” is an area in which there is only one full-time aural reception service; a “white area” is an area in which there are no full-time aural reception services.

⁹ See, e.g., Littlefield, Wolfforth, and Tahoka, TX, 12 FCC Rcd 3215 (Allocations Branch 1997) (proposed change of community of license that would provide a first local transmission service in its current community of license the station could eliminate a white area, providing a first full-time reception service to 411 people).

¹⁰ Specifically, 4,829 people would go from three to two services, 1,843 people would go from four to three services, and 8,104 persons would go from five to four services.

people in the gain area are well served with five or more full-time reception services.

7. We believe that, on balance, the new Cheyenne allotment should be preferred over Tracy's counterproposal.¹¹ Generally, we prefer a new allotment over an upgrade to existing service because the new allotment constitutes a new primary service to a community while the upgrade provides an expanded or enhanced secondary service. See Andalusia, AL, 49 Fed Reg. 32201 (August 13, 1984). See also Benton, Arkansas, 7 FCC Rcd 2555 (Policy and Rules Div. 1992). While Tracy has tried to rebut this presumption and to argue that its counterproposal should be preferred because it would provide second full-time reception service under Priority 2, we have found that this benefit is outweighed by the creation of white area to 211 people.¹² Under these circumstances, providing a 12th local transmission service to Cheyenne¹³ is preferable to granting the counterproposal. Our view is further buttressed by the fact that the Bridgeport downgrade will also result in 51 people losing a second full-time reception service, thus creating a gray area and will cause 14,776 other underserved persons to lose 3rd through 5th aural reception services.

8. Regarding the reimbursement and economic impact issues, we decline to require TSBII to pay the expenses in advance for the frequency change because no showing has been made as to TSBII's inability to reimburse Tracy. Absent a factual basis for questioning a party's financial ability to reimburse, we will leave matters such as the time and manner of reimbursement to the good faith negotiations of the parties. See Columbus, NE, 59 RR 2d 1185 (1989) and Dickson, TN, 4 FCC Rcd 8707 (1989). Furthermore, what constitutes legitimate and prudent expenses for reimbursement is also left to the good faith negotiation of the parties subject to Commission review if the parties are unable to reach agreement. See, e.g., Mayfield and Wickliffe, KY, 48 RR 2d 1232, 1235. Montgomery's argument that the proposed channel substitutions would adversely impact on programming and market area advertisers raises issues which the Commission has already determined are not relevant in either a licensing or allotment context. See Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 FCC Rcd 638 (1988), recon. denied, 4 FCC Rcd 2276 (1989); Cheyenne, Wyoming, 8 FCC Rcd 4473 (1993). Consequently, there is no basis under the

¹¹ The reference coordinates for a Channel 280C2 allotment at Cheyenne, Wyoming are 41-08-17 North Latitude and 104-48-22 West Longitude with a site restriction of 1.3 kilometers (.64 miles) northeast. The reference coordinates for Channel 239C3 at Gering, Nebraska are 41-51-50 North Latitude and 103-42-20 West Longitude.

¹² We recognize that in Seabrook and Huntsville, TX, 10 FCC Rcd 9360 (Commission 1995), the Commission held that a second aural service to 455 persons was de minimis and did not trigger priority (2) in view of a differential of 144,000 persons between the net gain in population of two competing upgrades. However, we believe that Seabrook is distinguishable from the instant case because we are dealing with a higher allotment priority, first full-time reception service. Further, in Seabrook, the Commission was comparing two mutually exclusive upgrades, one of which would provide a second full-time reception service as a positive public interest benefit. That case did not involve a proposal that would result in an loss of authorized first or second full-time reception services to individuals as the instant case does.

¹³ Cheyenne currently has 3 noncommercial educational FM stations, 5 commercial FM stations, and 3 AM stations. In addition, in MM Docket 96-242, there is a pending proposal to allot Channel 229A to Cheyenne that could result in an additional allotment to that community. The sole counterproposal in that proceeding was recently withdrawn.

current state of Commission precedent for consideration of those issues.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective May 30, 2000, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules IS AMENDED to read as follows:

<u>City</u>	<u>Channel No.</u>
Cheyenne, Wyoming	280C2, 250C1, 260A,, 264C1, 285A, 292C3
Gering, Nebraska	239C3

10. A filing window for Channel 280C2 at Cheyenne, Wyoming will not be opened at this time. Instead, the issue of opening a filing window for this channel will addressed by the Commission in a subsequent order.

11. IT IS FURTHER ORDERED, That pursuant Section 316(a) of the Communications Act of 1934, as amended, the license of Tracy Broadcasting Corporation, for Station KOLT-FM, Channel 280C3, Gering, Nebraska, IS MODIFIED to specify operation on Channel 239C3 at Gering, Nebraska, subject to the following conditions:

- (a) Nothing contained herein shall be construed as authorizing any change in license BLH-19960807KE except for the community as specified above. Any changes, except those specified, require prior authorization pursuant to an application for construction permit. (FCC Form 301).
- (b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-19960807KE except for the community as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

12. IT IS FURTHER ORDERED, That the counterproposal filed by Tracy Broadcasting Corporation for Channel 267C1 at Gering, Channel 280C1 at Pine Bluffs, and Channel 267C at Bridgeport, Nebraska IS DENIED.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Arthur D. Scrutchins or Darrell Baugess at (202) 418-2180 or Andrew J. Rhodes at (202) 418-2120.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
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